NO.

# in the Supreme Court of the United States

OCTOBER TERM, 1982

COLEMAN R. ROSENFIELD and
GLADYS ROSENFIELD,
*Petitioners,*

*vs.*

NEW ENGLAND MERCHANTS NATIONAL BANK
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT UNIT B

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## QUESTIONS PRESENTED FOR REVIEW

1. DOES THE FAILURE OR REFUSAL OF THE COURT OF APPEALS TO RULE ON AN ISSUE PROPERLY RAISED, BRIEFED AND ARGUED ON APPEAL, WHERE SAID ISSUE IS DISPOSITIVE OF THE CASE OR A SIGNIFICANT PORTION OF IT, CONSTITUTE DENIAL OF ACCESS TO THE COURTS AND THUS DENIAL OF DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. (*PETITIONERS RESPECTFULLY BELIEVE THIS TO BE A CASE OF FIRST IMPRESSION FOR THIS COURT.*)

2. IN A JURY TRIAL DID THE CONDUCT OF THE DISTRICT COURT BELOW, IN ADMITTEDLY TRYING TO "PROTECT" RESPONDENT AGAINST PETITIONER, IN ADMITTEDLY DECIDING THE CREDIBILITY OF THE WITNESSES, IN EXCLUSING MATERIAL AND RELEVANT EVIDENCE AND IN DIRECTING A VERDICT, CONSTITUTE CLEAR AND UNAMBIGUOUS BIAS AND PREJUDICE SUCH AS TO DENY PETITIONERS' DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

## RULE 28.1 LISTING

As to Petitioners, the following are the real parties in interest and any related companies: Coleman R. Rosenfield, Gladys Rosenfield, Mama Tino, Inc.

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Petitioners COLEMAN R. ROSENFIELD (hereinafter "Rosenfield") and GLADYS ROSENFIELD (hereinafter "Mrs. Rosenfield" and collectively "Petitioners Rosenfield") pray that this Court issue a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit Unit B which affirmed the directed verdict in favor of Respondent NEW ENGLAND MERCHANTS NATIONAL BANK (hereinafter "NEMNB") and which *expressly refused to rule on the propriety of the dismissal by way of Summary Judgment of Petitioners' Counterclaim even though it was an issue properly raised on appeal and briefed by both parties.*

## OPINION BELOW

The opinion of the court of appeals, reported at ____ F.2d ____ (5th Cir., Unit B, 1982) is printed in the Appendix to this Petition (A.2).

## JURISDICTION

The court of appeals filed its opinion and entered its judgment on July 1, 1982. A timely petition for rehearing which raised, among other things, the court of appeals' failure to rule on the issue of the summary judgment disposition of the Petitioners' counterclaim was denied, without opinion, on August 30, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(a) (1976).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in part, as follows:

> No person shall be . . . deprived of life, liberty, or property without due process of law; . . .

## UNITED STATES STATUTES INVOLVED

28 U.S.C. §1291, Judiciary Act

## STATEMENT OF THE CASE

### A. PROCEEDINGS BELOW

Respondent NEMNB brought suit in the United States District Court for the District of Massachusetts against Petitioners in July 1974 based on alleged guarantees. The complaint was filed over four years after the occurrence of the facts which give rise to the claim. The case was subsequently transferred to the United States District for the Southern District of Florida based on forum non-convenience pursuant to 28 U.S.C. §1401(a).

Petitioners raised various defenses including conditional delivery and filed a counterclaim alleging fraudulent inducement relative to the execution of the alleged guarantees.

On March 26, 1976 the trial court granted Respondent's motion for summary judgment as to the counterclaim on the basis that Petitioners' counterclaim for fraud was barred by the applicable statute of limitations even though it arose out of the same factual situation which gave rise to Respondent NEMNB's claims on the alleged guarantees which were not barred by any statute of limitations.

Thereafter a jury trial was held on February 14, 1977. At the close of the case, but before the jury returned a verdict, the trial court directed a verdict in

favor of Respondent NEMNB and against both Petitioners by order dated March 9, 1977. From that directed verdict a timely appeal was taken to the United States Court of Appeals for the Fifth Circuit, Unit B.

In its opinion entered on July 1, 1982, the court of appeals affirmed the trial court's directed verdict but *expressly failed and refused to rule on the issue of the summary judgment* which dismissed Petitioners' Counterclaim even though that issue was clearly raised on appeal and briefed by both sides.[1] (A. 13). In so doing the court of appeals stated in its Opinion that:

> *This counterclaim was dismissed prior to trial on statute of limitation grounds and is not involved in this appeal.* (Emphasis added).

(A. 13).

Thereafter Petitioners filed a timely petition for rehearing in which they, among other things, pointed out that the court of appeals had improperly failed to rule on the validity of the summary judgment dismissing to Petitioners' Counterclaim. (A. 38). The court of appeals denied the petition for rehearing on August 30, 1982 without opinion and again refused to address the vital issue of Petitioners' counterclaim. (A. 43).

From the foregoing rulings the following Petition for Certiorari is taken.

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[1]See, excerpts from Appellants' and Appellee's briefs reprinted in the Appendix to this Petition.

## B. STATEMENT OF THE FACTS

In 1968 Petitioner Coleman Rosenfield was a lawyer and an officer of a franchise business known as Mama Tino's Inc. That company promoted franchised Italian restaurants. In 1969 and 1970 Mama Tino's borrowed money from Respondent NEMNB for business purposes. Thereafter the business experienced difficulties and a $2,500,000.00 public offering it had anticipated did not materialize.

With this background Petitioner Rosenfield and the President of Mama Tino's, a Mr. Fiorentino, sought an extension of the company's loans from Respondent NEMNB. Respondent would only extend the loans if both the Petitioners and Mr. and Mrs. Fiorentino executed personal guarantees for the company's indebtedness.

Petitioner Rosenfield claimed that the guarantees were signed and delivered to NEMNB on the express condition that the bank would lend the company an additional $50,000.00 as well as extend the existing loans. Rosenfield testified that on the basis of NEMNB's unequivocal promise of additional funding, the guarantees were executed and conditionally delivered in February, 1970.

Thereafter, the additional $50,000 loan was not forthcoming, which materially contributed to the necessity for the company to file for bankruptcy in May, 1970.

There was deposition testimony from a Mr. Carl Schaeffer that at or just before the bankruptcy a senior officer of Respondent NEMNB had stated that the bank had committed to make an additional $50,000 loan

to Mama Tino's and then decided to renege on that additional loan. Mr. Schaeffer was an attorney for a third party bank which had dealings with Mama Tino's. He had been personally involved in the negotiations to try and save the company prior to the bankruptcy. (R. 670-671).

Mr. Schaeffer's deposition testimony was proferred into evidence by the Petitioners. It was excluded by the trial court on the basis that Mr. Schaeffer could not personally testify that Respondent NEMNB's offer of an additional loan had been made at or before the date of the execution of the guarantees. (A. 19; T. 55).

Respondent NEMNB was represented by attorney, J. J. Simons, in the bankruptcy proceeding. Attorney Simons and Respondent Rosenfield had a conversation which was extremely relevant to this case; however, they disagree as to what was said. Respondent Rosenfield testified that Mr. Simons, the attorney for Respondent NEMNB, told him that NEMNB would not enforce the guarantees of Petitioners. (T. 122-123). Mr. Simons testified that he had said that he, Mr. Simons, would not proceed against the Rosenfields on their guarantees but "believe[s]" he told Petitioner Rosenfield that Respondent NEMNB was going to sue. (T. 178).

Thereafter, Respondent NEMNB waited over four years to file the present action. The expiration of this period allowed the claims Petitioners had against Respondent to expire based on the running of the relevant statute of limitations.

## JUDICIAL CONDUCT DURING AND BEFORE TRIAL

During the course of the pre-trial conference, held just before the trial, the trial judge stated "Probably we shouldn't have the jury that sat on the last case." (T. 47). That jury, which was still part of the venire panel at the time of this trial, had just rendered a defendant's verdict in a guarantee case strikingly similar to the present case.

Throughout the pre-trial conference the judge indicated his readiness to direct a verdict or grant summary judgment in favor of the Respondent (T. 43, 44, 45) but refrained from doing so because of his lack of faith in the court of appeals (T. 68).

At the trial itself the judge openly stated that he thought Petitioner Rosenfield, who he pointed out was a lawyer, was lying[2] (T. 116, 124, 132). At one point at the close of Petitioner Rosenfield's direct testimony the judge stated he was going to direct a verdict because Petitioners were bringing in "extraneous information" and Petitioner Rosenfield was "volunteering information" (T. 127). Counsel for Respondent, in whose favor such a directed verdict would have run, had to beg the judge not to do so pointing out it would constitute reversible error. (T. 127-128)

Following this a truly remarkable exchange occurred in which the judge candidly admitted he had been

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[2]The district court stated: "I don't believe a word this witness is testifying to" and "I think he has been lying from the minute he got on the stand." (T. 132)

trying to protect the Respondent NEMNB. It was as follows:

> Mr. Cohn (Respondent NEMNB's counsel): I'm not sure it is so obvious to the jury, Your Honor. If I recall, none of them ever had any dealings with banks.
>
> The Court: I am going to let you go ahead. *I have been trying to protect you, Mr. Cohn.* But you go ahead. (Emphasis added) (T. 306).

At the close of the testimony the judge directed a verdict in favor of Respondent stating that he, rather than the jury, had determined the credibility of the witnesses and which witnesses were to be believed. (T. 316).[3]

During the course of the trial Petitioners moved the trial judge to recuse himself when it became apparent that he had abandoned any pretense of impartiality in the conduct of the trial. The judge denied that motion. (T. 171).

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[3]The district court's exact quote is:

> Ordinarily it is up to the jury to make a determination of credibility of witnesses. *I make that determination myself.* (T. 316)

(Emphasis added).

## REASONS WHY THE WRIT SHOULD BE GRANTED

The Constitution of the United States and its statutes guarantee an individual the right to a fair and impartial trial. Additionally, the individual is guaranteed the right of appeal to the court of appeals. 29 U.S.C. §1291. This right necessarily requires that the court of appeals rule on all issues that are dispositive of the merits of the controversy if properly raised on appeal.

In the present case both of these rights were denied Petitioners. The trial judge's conduct clearly demonstrated his bias against Petitioners and towards Respondent NEMNB. It would appear from the record that this bias caused the trial judge to exclude relevant testimony in the form of Mr. Schaeffer's deposition which had it been admitted, would have given rise to a jury issue. Additionally this bias would appear to have caused the trial judge's determination of the credibility of the witnesses, especially as between Respondent's lawyer Mr. Simon and Petitioner Rosenfield relative to whether or not Respondent had agreed and promised to not pursue the guarantees. This was clearly a very material issue which should have gone to the jury.

Had the trial judge not acted in a biased manner he would have admitted evidence whose admittance is required by law and not ruled on the credibility of witnesses all of which would have created jury issues which in turn would have prevented a directed verdict in favor of Respondent.

The court of appeals' opinion expressly approves the trial judge's flagrant bias against Rosenfield. (A.

23) Further, contrary to the very law cited in the opinion the appellate court also makes prohibited credibility choices. (A. 18)

Further, the Petitioners were entitled as a matter of right under the Constitution of the United States, its statutes and the case law to have their appeal heard and ruled on as to the trial court's grant of summary judgment in favor of Respondent based on the expiration of the statute of limitations relative to Petitioners' Counterclaim. The court of appeals' failure to rule on this issue constituted a denial of this right. (Petitioners respectfully believe this issue to be one of first impression for this Court.)

## I.

## PETITIONERS WERE DENIED ACCESS TO THE COURTS AND THUS DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT AS A RESULT OF THE COURT OF APPEALS FAILURE AND REFUSAL TO RULE ON AN ISSUE PROPERLY RAISED AND BRIEFED ON APPEAL.

The trial court below, ruling that Petitioners' counterclaim, which sounded in fraud, was barred by the applicable statute of limitations, granted a summary judgment in favor of Respondent NEMNB as to that counterclaim (A. 28-29). That summary judgment order did not dispose of all the claims between all the parties and thus was not appealable at the time it was entered. Fed.R.Civ.P. 54(b); *Adams General Contractors, Inc. v. Department of Housing and Urban Development*, 501 F.2d 176 (5th Cir. 1974).

The summary judgment became appealable at the close of the case below when the trial court entered its order of directed verdict as to all remaining issues between the parties. Fed.R.Civ.P. 54(b).

The granting of that summary judgment was duly raised on appeal and briefed as an issue on appeal by Appellants Rosenfield before the court of appeals below (A. 30). The Respondent NEMNB in turn replied to the summary judgment issue and addressed it in its brief (A. 24). This issue was thereafter orally argued before the court of appeals.

Following all of this the court of appeals in its decision held that:

> The Rosenfields also counterclaimed, seeking damages from the bank for refusing to lend Mama Tino an additional $50,000 for working capital. *This counterclaim was dismissed prior to trial on statute of limitations grounds and is not involved in this appeal.*

(Emphasis added). (A. 13).

The error of the foregoing and the court's failure to rule on the issue was pointed out to the court of appeals in Petitioners/Appellants' petition for panel rehearing (A. 38). That petition was denied by the court of appeals without opinion or any other ruling as to the summary judgment issue on August 30, 1982 (A. 43).

*Petitioners believe that this case presents an issue of first impression for this Court.* After diligent research

Petitioners have been unable to find any case in which this Court has ruled on the propriety of a court of appeals failing or refusing to rule either directly or indirectly on an issue properly raised on appeal.

The Fifth Amendment to the United States Constitution guarantees due process of law. Pursuant to that amendment and Article III of the Constitution of the United States Congress created the various courts of appeal and made them the only court in which there was an appeal by right from the final decisions of the district courts. 28 U.S.C. §1291.

Therefore, the court of appeals below was the only court to which the Petitioners had the right to appeal the district court's dismissal of their counterclaim by means of summary judgment. It is implicit from the right of appeal that the court of appeals has a absolute duty to rule on all issues properly raised on appeal.

The case law tends to imply such a duty on the part of the courts of appeal but does not expressly so state in relations to civil cases. For example the United States Fifth Circuit Court of Appeals has stated that:

> [O]ur function is, of course, to assay the asserted errors of the judge . . .

*Molnar v. Gulfcoast Transit Co.*, 371 F.2d 639 (5th Cir. 1967). See also, *United States v. State of Florida*, 482 F.2d 205 (5th Cir. 1973); *Empire Life Ins. Co. v. Valdak Corp.*, 468 F.2d 330 (5th Cir. 1972).

In a criminal setting the issue has been somewhat more directly addressed by the Ninth Circuit which

stated that a criminal appeal imposes upon the appellate court the duty of determining the questions which are raised on appeal. *Leahy v. United States*, 272 F.2d 487 (9th Cir.) *cert. dismissed* 81 S.Ct. 465, 364 U.S. 945 (1961).

None of these decisions, nor any other case which Petitioners have been able to find after diligent research, rule directly on the issue of an appellate court's having failed or refused to rule on an issue properly raised on appeal.

The court of appeals' failure below to rule on an issue which was clearly and properly presented before it denied Petitioners access to the courts of appeal as provided for under 28 U.S.C. §1291 and thus constituted a denial of due process of law as guaranteed under Amendment Five to the Constitution of the United States.

This denial should be addressed by this Court since it raises issues which are far wider than this case alone such as an appeals court's ability to "duck" difficult or unpopular issues by simply not ruling on them. In the present case the court of appeals, either by mistake or intent, "ducked" the issue by stating in its opinion that "This counterclaim . . . is not involved in this appeal." (A. 13). This Court cannot allow such a denial of justice to go uncorrected.

## II.

## PETITIONERS' COUNTERCLAIM WAS NOT BARRED BY THIS APPLICABLE STATUTE OF LIMITATIONS IN THAT IT AROSE OUT OF THE SAME FACT SITUATION AS RESPONDENT'S CLAIMS.

Petitioners' based their counterclaim on an agreement by Respondent NEMNB to provide an additional $50,000 in funding to Petitioners' company, Mama Tino Inc., in return for Petitioners' guarantees of the company's obligations to the Respondent bank. Petitioners alleged in that Counterclaim that they were fraudulently induced by Respondent NEMNB to give their guarantees to the bank in that the bank had no intention of going through with the additional funding at the time it induced Petitioners to sign the guarantees in return for the additional funding for the company. Thus, the counterclaim arises out of the exact same factual situation which formed the basis for Respondent's NEMNB claims against Petitioners Rosenfield based on the guarantees.

Respondent carefully waited over four years to file its claims against Petitioners in the case below. This was done after Petitioner Rosenfield testified he was told by Respondent's attorney, Mr. Simons, that the Respondent would not bring suit on the guarantees and that attorney admitted the occurrence of such a conversation. The only difference in the two versions of the story is that the attorney, Mr. Simons, testified

that he said he, Mr. Simons, would not bring suit rather than his client the Respondent would not bring suit.[4]

Thereafter, Respondent NEMNB carefully waited over four years before bringing the present action. During that four year period, and in reliance on the representation that no suit would be brought by Respondent, Petitioners allowed the applicable statute of limitations governing claims of fraud to expire.

The old and extremely harsh common law rule was generally that compulsory counterclaims ordinarily barred by a statute of limitation were not revived by the filing of a claim arising out of the same factual situation. For the history and application of this rule see generally 53 C.J.S. Limitations of Actions §106 Set Off, Counterclaim and Cross Demand.

The more modern rule which is being adopted around the country is that such a counterclaim is not barred. Rather the running of the statute is tolled by the filing of the main claim. *Hernas v. City of Hickory Hills*, 507 F.Supp. 103 (N.D. Ill. 1981); *Chauffeurs, etc. v. Jefferson Trucking Co., Inc.*, 473 F.Supp. 1255 (S.D. Ind.) *affirmed* 628 F.2d 1023 (7th Cir.) *cert. denied* 101 S.Ct. 942 (1981); *Nalley v. M'Clements*, 295 F.Supp. 1357 (D. Del. 1969); *Azada v. Carson*, 252 F.Supp. 988 (D. Hawaii 1966); *United States v. Southern California Edison Co.*, 229 F.Supp. 268 (S.D. Cal. 1964); *c.f. Erie Lackwanna R.R. Co. v. United States*, 439 F.2d 194 (Ct. Claims 1971).

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[4]This clearly raised an issue of credibility which should have been resolved by the jury relative to Petitioners' defenses of estoppel and abandonment and their counterclaim.

Florida has joined in adopting the rule that compulsory counterclaims are not barred by the applicable statute of limitations but that rather such statute is tolled by the filing of the main claim. *Cherney v. Moody*, 413 So.2d 866 (1st Fla. DCA 1982). That case was certified to the Florida Supreme Court.

In the present case the actions of Respondent and its attorney in lulling Petitioners into inaction over a period of in excess of four years while their claims ran is particularly egregious. They demonstrate the exact reason why the modern rule as set forth above should be followed. To do otherwise would allow potential plaintiffs to take unconscionable advantage of the passage of time when they know that claims against them are governed by statutes of limitation which are of a shorter duration than those governing their own claims.

## III.

## THE TRIAL COURT'S OPEN DISPLAY OF BIAS AND PREJUDICE IN THE CONDUCT OF THE TRIAL DENIED PETITIONERS' DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMEND AND REQUIRES REVERSAL OF THE DIRECTED VERDICT BELOW.

As outlined in the facts above the trial court apparently harbored hostility toward Petitioner Rosenfield because he was an attorney seeking to avoid the effects of a guarantee which he had signed.

Prior to the start of trial the district court sought to exclude jurors who had sat on a prior case from

hearing the present case. That prior jury had ruled in favor of the defendants in another guarantee case and the trial court was not about to let that happen again. The trial court had clearly prejudged the case and was prepared to direct a verdict before the close of the evidence. The judge was dissuaded from doing so only as a result of the pleading of Respondent's attorney at trial who was clearly afraid of reversible error.

Further, the trial judge admitted in open court that he had taken it upon himself to judge the credibility of the witnesses when such a determination was the responsibility of the jury stating:

> Ordinarily it is up to the jury to make a determination of credibility of witnesses. *I make that determination myself.*

(T.316) (emphasis added).

Finally, in what can only be considered as a truly remarkable admission by a sitting district judge in the middle of a jury trial the trial court stated to Respondent's NEMNB trial counsel that:

> *I have been trying to protect you, Mr. Cohn.* (Emphasis added). (T. 306).

There can be no clearer statement of prejudice or bias on the part of a trial court since it is clearly not proper for the trial judge to try and "protect" either side. Rather he is required to be neutral as between the parties. *Cross v. State of Georgia*, 581 F.2d 102 (5th Cir. 1978). A fair trial by an unbiased and nonpartisan

court is the essence of the adjudicatory process. *Baker v. Simmons Co.*, 342 F.2d 991 (5th Cir.) *cert. denied* 86 S.Ct. 49, 382 U.S. 820 (1965); *National Labor Relations Bd. v. Phelps*, 136 F.2d 562 (5th Cir. 1943). In fact, even the appearance of bias must be avoided. *Commonwealth Coatings Corp. v. Continental Casualty Co. of Puerto Rico*, 89 S.Ct. 337, 393 U.S. 145 (1969).

The appellate court's approval of the conduct of the trial court below in prejudging the case and then acting on that prejudgment to control the admission of evidence, to determine the credibility of witnesses and to direct a verdict in favor of Respondent NEMNB constituted a deprivation of Petitioners' property without due process of law in violation of the Fifth Amendment of the United States Constitution. *Rosenberg v. Baum*, 153 F.2d 10 (10th Cir. 1946).

The court of appeals below ruled that there was no legal prejudice to Petitioners because the district court properly directed a verdict in favor of Respondent NEMNB. This, however, ignores the factor of the district court having controlled the flow of evidence into the record by excluding pertinent deposition testimony and improperly ruling on the credibility of the witnesses as is more fully discussed below. Such actions were clearly controlled by the court's apparent bias and prejudice. Thus, they fatally taint the trial court's direction of a verdict in favor of Respondent and must be reversed.

## IV.

## THE DISTRICT COURT AND COURT OF APPEALS RULINGS THAT PETITIONER ROSENFIELD'S TESTIMONY WAS NOT BELIEVABLE BECAUSE IT WAS SELFSERVING CONSTITUTED A DENIAL OF DUE PROCESS OF THE LAW AS GUARANTEED BY THE UNITED STATES CONSTITUTION IN THAT THE SAME STANDARDS WERE NOT APPLIED TO RESPONDENT'S TESTIMONY WHICH WAS EQUALLY SELFSERVING.

The district court justified its failure to give credit to Petitioner Rosenfield's testimony to the fact that it was "selfserving" because he was trying to avoid the effect of the guarantees. On the other hand, it characterizes the testimony of Respondent's employees who procured the guarantees, who were seeking to enforce them and who made the false representations as being unimpeachable. That testimony was equally as selfserving as Petitioners.

The court of appeals' opinion adopts this line of reasoning. On one hand the opinion rejects Rosenfield's "self-serving" statements and the testimony tending to corroborate them while on the other accepts the bank employees' self-serving statements because they "corroborated" each other. (A. 19-20)

This is especially true when corroborating testimony was excluded. As discussed below, it was improper to exclude Shaeffer's corroborating deposition testimony on the basis that the bank's statement made to him in

May about a $50,000.00 loan to the corporation could not possibly corroborate Rosenfield's statement that a commitment to fund the additional $50,000.00 in the future had been made to him by the bank in February.

What is actually involved here is a question of credibility which is solely within the province of the jury to decide *Glazer v. Glazer*, 374 F.2d 390, 400 (5th Cir.) *cert. denied* 389 U.S. 831, 88 S.Ct. 100 (1968). In fact the district court admitted it was making credibility decisions as between the witnesses (T. 316). Thus, in the present case the district court clearly made improper and prohibited decisions as to credibility.

The court of appeals seeks to justify such actions by finding that Petitioner's testimony was so self-serving and unsupported that it was incredible. In doing so the court of appeals relies on *United States v. Generes*, 405 U.S. 93, 106, 92 S.Ct. 827, 834 (1972). However, the test for such incredible testimony as set forth in *United States v. Generes* requires that no jury could believe the testimony.

Can it be said, as a matter of law, that no jury could believe that, based on the testimony of this case, when Petitioner's Rosenfield executed the guarantee he believed that the bank had promised to lend his company an additional $50,000.00 as needed?[5]

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[5]Certainly the district court felt there was some possibility of the jury's believing Petitioners' testimony since it refused to allow the case to go the jury stating:

> "Just exactly what I feared would happen has happened. There has been no attempt to present the case on the

Equally important is the district court and the court of appeals application of a double standard as to what constitutes "selfserving" testimony as between Petitioners and Respondent. If Petitioner Rosenfield's testimony is to be viewed as selfserving because he is trying to avoid the effect of the guarantees then Respondent's NEMNB testimony is equally "selfserving" because they are trying to enforce those same guarantees. What we have here is a classic case of witness credibility which must be decided by the jury.

This application of a double standard constitutes a denial of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

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(Footnote 5 Continued)

> facts. But there has been attempts to throw sand in the eyes of the jury from the very start of this case. I let a lot of evidence in about surmise and all the prejudicial thing that have come in.

(T. 312)

> "I concluded fairly early in the trial, and certainly after I heard all of the testimony, that if the jury had brought in a verdict which supported Mr. Rosenfield, I could not, in good conscience, permit that verdict to stand."

(T. 316-317)

## V.

## THE DISTRICT COURT AS A RESULT OF ITS BIAS IMPROPERLY EXCLUDED FROM EVIDENCE DEPOSITION TESTIMONY OF A MATERIAL WITNESS.

Part of Petitioners' defense was that Respondent had agreed to provide the company, Mama Tino Inc., with an additional $50,000 loan in return for the subject guarantees. At trial Petitioners sought to introduce the deposition testimony of Carl Schaeffer, an attorney for a third party bank which had also lent money to the company and which had been in negotiation with Respondent relative to the company. Mr. Schaeffer would have testified that a vice-president of the Respondent had admitted in conversation, after the date of the guarantees, that Respondent intended to make such a $50,000 loan and later reneged on that agreement. Such testimony was relevant to corroborate the fact that a $50,000 loan was in fact an issue between the parties. The exclusion by the district court was upheld by the court of appeals because the subject conversation occurred some three months after the date of the guarantees. This ignores the fact that the $50,000.00 was to be funded on an as needed basis in the future after the guarantees were signed.

Rule 402 of the *Federal Rules of Evidence* provides that all relevant evidence is generally admissible. Rule 401 of the *Federal Rules of Evidence* sets forth the definition of relevant evidence:

> "Relevant evidence" means evidence having *any tendency* to make the existence of any

> fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. (Emphasis added).

The trial judge excluded the deposition testimony of Mr. Carl Schaeffer, an attorney for Butler's Bank, on the grounds that:

> [T]here is nothing in the deposition that indicates that this promise of $50,000 was made at or prior to the time the guarantee was given (T. 55).

In excluding Mr. Schaeffer's testimony on this ground, the district court and the court of appeals virtually ignored the definition of relevant evidence as set forth above.

Mr. Schaeffer would have testified that Mr. MacAlear, one of the bank's vice-presidents, stated to him that the bank agreed to make $50,000 in working capital available to the bankrupt corporation, *Mama Tino, Inc.* (R. 670-671).

Under questioning Mr. Schaeffer testified as follows:

> Q: So, you have, strictly from your own memory as apart from a written record, a recollection that Mr. MacAlear committed New England Merchants National Bank to make an unsecured loan unconditionally for $50,000 to Mama Tino?
>
> A: *That is absolutely right.* (R. 670-671).

This testimony directly and unequivocally supports what the Defendants have been contending throughout this litigation; to-wit that there was an agreement to lend an additional $50,000 in return for the subject guarantees.

Mr. Schaeffer would have further testified that Mr. MacAlear told him that after the promise had been made, the bank decided to renege on it (R. 664).

The fact that these conversations took place subsequent to the execution of the guarantees is immaterial in that they nevertheless has a tendency to show that the $50,000 loan commitment was, in fact, made. The issue of whether that commitment was made at the time of the guarantees or later was a fact issue for the jury to decide. Moreover, Mr. Schaeffer's testimony would have directly conflicted with that of the bank's representatives who denied that the bank had ever made such a commitment under any circumstances thus raising the issue of the bank's credibility which the court of appeals found to be unimpeachable (T. 197).

Also Mr. Schaeffer's testimony would have further corroborated the fact that the $50,000 loan would have helped to salvage *Mama Tino's* situation.

In addition, the testimony of Mr. Schaeffer was from a witness who was not only impartial, but might well have been expected to be adverse to the Defendants. Mr. Schaeffer represented Butler's Bank, a major creditor of *Mama Tino* and an institution which had lost substantial sums of money as a result of the *Mama Tino* bankruptcy. He certainly had no reason, therefore, to be favorably disposed toward the Defendants. Clearly, Mr. Schaeffer

would have been perhaps the only truly disinterested witness in the trial. His testimony lent considerable credence and support to that of Rosenfield while, at the same time, reflected adversely on the believability and credibility of the bank's officer.

In excluding the testimony of Mr. Schaeffer the court ruled, in effect, that such testimony had no tendency to make the existence of any fact more or less probable than it would be without such testimony. For the reasons discussed herein, the exclusion of this testimony was clear error.

## VI.

## THE DISTRICT COURT'S DIRECTION OF A VERDICT IN FAVOR OF RESPONDENT WAS FATALLY TAINTED BY ITS APPARENT BIAS, ITS IMPROPER DETERMINATION OF WITNESS CREDIBILITY AND ITS IMPROPER EXCLUSION OF EVIDENCE.

As is more fully discussed above the district court improperly made determinations of witness credibility, and excluded relevant testimony. Such determinations were or are arguably the result of the district court's apparent bias and prejudice against Petitioner Rosenfield also discussed above.

Even without reference to why it was done had those credibility choices not been made by district court and/or the evidence in question not been excluded the direction of a verdict in favor of Respondent would have been improper. Therefore, the decision below must be reversed.

## CONCLUSION

*This is a case of first impression* as to the court of appeal's failure or refusal to rule on an issue properly raised on appeal. It should be made clear to all the courts that they have a Constitutional and statutory duty to rule on all issues properly raised before them. The failure to do so constitutes a denial of access to the courts in violation of the due process of law requirements of the Fifth Amendment to the Constitution of the United States.

Further, the district court's obvious bias and prejudice below which resulted in improper exclusion of evidence, improper determination of credibility of witnesses and the direction of a verdict also constitute a denial of due process of the law guaranteed by the Fifth Amendment to the Constitution of the United States.

For these reasons certiorari should be granted.

Respectfully submitted,

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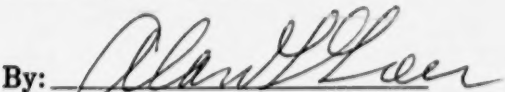
By: 
ALAN G. GREER

By: _____
BERTHA CLAIRE LEE

## APPENDIX

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**NEW ENGLAND MERCHANTS NATIONAL BANK,**
**Plaintiff-Appellee,**

**v.**

**Coleman R. ROSENFIELD, and Gladys Rosenfield,**
**Defendants-Appellants.**

**No. 77-1627.**

United States Court of Appeals,
Fifth Circuit.*
Unit B

July 1, 1982.

Diversity action was brought against guarantors of several defaulted promissory notes. The United States District Court for the Southern District of Florida, at Fort Lauderdale, Gus J. Solomon, J., sitting by designation, rendered judgment against guarantors, and they appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) Massachusetts law applied; (2) any release of other guarantors did not release defendant guarantors; (3) defendant guarantor's self-serving testimony did not provide probative evidence supporting condition delivery and cancellation defenses; and (4) consideration was necessary for statement that guarantors would not be sued to be enforceable.

Affirmed.

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*Former Fifth Circuit Case, Section 9(1) of Public Law 96-452—October 14, 1980.

1. Federal Courts—409

Rule of decision in a diversity case is a matter of state law selected under the conflicts of law principles of the state where the district court sits.

2. Federal Courts—157

Where diversity case is transferred to another for convenience of parties and witnesses, in the interests of justice, transferee court must apply the conflicts of law principles of the transferor state unless venue in the transferor state was improper. 28 U.S. C.A. §1404(a).

3. Guaranty—2

To determine validity of contract of guaranty, Massachusetts courts look first to the substantive law the parties select, if any, and ordinarily respect such a selection unless intolerable conflict with Massachusetts policy would result.

4. Guaranty—2

Massachusetts law provided the rule of decision in suit against guarantors of promissory notes where the guaranties contained no choice of law provision but incorporated by reference the terms of notes guaranteed, which provided that Massachusetts law should govern, and where, in any event, lender accepted the guaranties in Massachusetts and acted upon them there by renewing notes of corporation, which operated business in Florida, and where Massachusetts law governed the underlying notes.

**5. Release—28(3)**

**Rule of Massachusetts contract law that release of one potentially liable party releases all is inoperative where the parties in writing evidence a contrary intent.**

**6. Guaranty—49**

**Even if provision of employment agreement with one guarantor whereby lender agreed not to call upon him and wife to pay off borrower's debts was equivalent of a release, such did not release other guarantors under Massachusetts law where the guaranties themselves provided that lender could release any of them without releasing the others and no Massachusetts public policy required a different result.**

**7. Guaranty—78(1)**

**If guaranties of corporation's promissory notes were delivered to lender subject to condition that lender lend an additional amount, failure to make that loan would bar recovery in suits on the contracts of guaranty.**

**8. Guaranty—6**

**Fact that lender conditioned acceptance of guaranty on receipt of guarantors' financial statements was of no significance to the effectiveness of the guaranties, as the condition was for the sole benefit of the lender, which was therefore free to waive it.**

**9. Federal Courts—416**

Sufficiency of evidence in a diversity case is a federal question.

**10. Federal Civil Procedure—2127**
**Federal Courts—798**

In determining whether to grant a directed verdict, court must consider all the evidence, not just the evidence that supports nonmovant's case, in the light most favorable to the nonmovant, and if the facts and inferences presented at trial so strongly favor the movant that a reasonable jury could not arrive at a verdict against it, court must direct a verdict, and the same test governs the court on appeal.

**11. Evidence—588**

While neither trial nor appellate court may make credibility choices, neither court is required to accept, as credible, unsupported, self-serving testimony that flies in the teeth of unimpeachable contradictory evidence and universal experience.

**12. Guaranty—91**

In suit against guarantors of defaulted promissory notes, trial court was entitled to conclude that lender had never promised to lend borrower additional money for working capital as a condition of effectiveness of stockholders' guaranties, despite guarantor's self-serving testimony that guarantees were so conditioned.

13. Guaranty—91

Contention of guarantor that lender had promised to release guarantors the moment borrower sued third party was not supported by probative evidence, notwithstanding guarantor's self-serving testimony that lender had made such a promise in conversation with another guarantor, who denied that such a conversation had occurred.

14. Guaranty—49

Assuming that lender stated that it would not bring suit against guarantors, such was no defense to suit on guaranties in absence of consideration for the claimed discharge.

15. Federal Courts—906

Where trial court properly directed a verdict, prejudice to the jury arising from the court's alleged conduct during trial was irrelevant.

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Appeal from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, TJOFLAT and THOMAS A. CLARK, Circuit Judges.

TJOFLAT, Circuit Judge:

New England Merchants National Bank of Boston, Massachusetts (New England Merchants), brought this

diversity action against Coleman and Gladys Rosenfield, the guarantors of several defaulted promissory notes given the bank by a bankrupt restaurant chain, Mama Tino, Inc. The amount due on the notes, $371,196, was not in dispute, but the Rosenfields denied they were liable to the bank as guarantors. The case was tried to a jury, and at the close of all the evidence the court directed a verdict in favor of the bank. In this appeal, the Rosenfields argue on several grounds that they are entitled to judgment as a matter of law or, alternatively, a new trial. None of their arguments has merit, and we therefore affirm.

I.

In 1968, Nicholas and Pauline Fiorentino and Coleman and Gladys Rosenfield, decided to establish a chain of Italian restaurants. They lacked sufficient capital to fund the enterprise, so they persuaded several investors, including Jessup & Lamont, a New York brokerage firm, to join them. This group formed Mama Tino, Inc., and the Fiorentinos and the Rosenfields collectively purchased the controlling stock interest in the corporation.[1] Mama Tino's board of directors[2] elected Coleman Rosenfield chairman of the board and treasurer of the company and Nicholas Fiorentino president and

[1]The record does not indicate precisely what percentage of the issued and outstanding shares of Mama Tino, Inc., each of the Fiorentinos and Rosenfields owned.

[2]The record does not indicate the size of Mama Tino's board of directors or identify any of the directors other than Coleman Rosenfield, Nicholas Fiorentino and an unnamed representative of Jessup & Lamont.

chief executive officer. Jessup & Lamont became Mama Tino's financial advisor.

Mama Tino started its restaurant chain in South Florida with eight restaurants.[3] To obtain the funds necessary to construct these restaurants and to provide working capital, Mama Tino borrowed nearly one million dollars from Butlers Bank Limited of Nassau, Bahamas (Butlers Bank), and New England Merchants. This borrowing took place during various stages of restaurant construction and involved a series of promissory notes, some secured by restaurant properties and some unsecured. Mama Tino gave New England Merchants three of the unsecured notes: a $100,000 note due February 2, 1970; a $50,000 note due February 9, 1970; and a $50,000 note due March 9, 1970. Coleman Rosenfield executed each note as chairman of the board.

It soon became apparent that Mama Tino was undercapitalized. To cure this problem, its board of directors asked Jessup & Lamont to arrange a public stock offering. When, after considerable effort, Jessup & Lamont was unable to bring a stock issue to market, Mama Tino was forced to look elsewhere for help.

Coleman Rosenfield and Nicholas Fiorentino contacted Constantinos Philips, assistant vice-president of New England Merchants, and asked that the bank renew Mama Tino's $100,000 note due February 2, 1970, and its $50,000 note due February 9, 1970; "discount"

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[3]Mama Tino apparently operated its restaurants through wholly-owned subsidiary corporations. This fact is irrelevant to this appeal; therefore, we will treat Mama Tino as the owner and operator of each restaurant.

two of Mama Tino's outstanding secured loans;[4] and lend $50,000 to Mama Tino for working capital. On February 2, 1970, Philips wrote Nicholas Fiorentino stating that the bank would discount the two secured loans and would renew the two notes if the Fiorentinos and the Rosenfields guaranteed all of Mama Tino's indebtedness to the bank; the bank, however, would not lend Mama Tino the additional $50,000 it requested. Philips also stated that each guarantor would have to file a personal financial statement with the bank. Nicholas Fiorentino and Coleman Rosenfield discussed this letter and decided to proceed in accordance with its tenor. On February 6, 1970, Coleman Rosenfield, as chairman of Mama Tino's board of directors, signed a thirty-five day $150,000 promissory note, dated February 2, 1970, payable to New England Merchants, and on February 8, Nicholas Fiorentino hand delivered the note and the required guaranties to the bank in Boston. On February 10, the bank marked paid the Mama Tino notes due February 2 and 9, 1970, and entered the new $150,000 note on its ledger. At this time, Nicholas Fiorentino gave the bank his personal financial statement, but the other guarantors did not.

Mama Tino was unable to obtain from any source the working capital it needed, and it developed a negative cash flow. It did not pay the unsecured notes due New England Merchants in March 1970, and in April Philips went to Florida to evaluate Mama Tino's financial condition. At an April 9 meeting of Mama Tino's board

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[4]The record does not identify the obligee of these loans, the terms thereof, or what "discount" meant.

of directors,[5] Philips learned that the company was technically insolvent and that additional operating funds were not available. Philips repeated to the board what he had written Nicholas Fiorentino on February 2: New England Merchants would make no more loans to the company. Philips also asked the Rosenfields and Mrs. Fiorentino for the financial statements they had neglected to furnish the bank. Mrs. Fiorentino immediately complied, signing her husband's financial statement. But the Rosenfields refused to provide their financial statements until they discussed the matter with their attorney, and, in the end, they never submitted their statements to the bank. Coleman Rosenfield told Philips that his guaranty might not be enforceable, though he did not explain why. Philips consequently had Rosenfield reexecute his guaranty on the spot.

Mama Tino's board of directors thereafter met several times to discuss the company's financial troubles. By April 21, 1970, the board members concluded that unless they immediately raised $50,000 in working capital, the company was headed for bankruptcy. In May, Coleman Rosenfield proposed that Mama Tino raise the $50,000 by selling its surplus real estate and by instituting a damage suit against Jessup & Lamont for failing to

[5]The minutes of the April 9, 1970, meeting of the board of directors of Mama Tino were not offered in evidence; nor were the minutes of any other board meeting. Several witnesses testified to what transpired at these meetings, however, after referring to the written minutes, on both direct and cross-examination, to refresh their recollections. As a result, there was no material dispute in the evidence as to what took place at any of these board meetings.

perfect a public stock offering.[6] The real estate was not sold, however, and Mama Tino, on June 3, 1970, commenced proceedings in the Southern District of Florida for an arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C. §701 et seq. (1976). On the same day Mama Tino brought a damages action against Jessup & Lamont in Florida state court. The case was soon dismissed, however, because the court lacked personal jurisdiction over Jessup & Lamont.

To protect its financial interest in Mama Tino and to proceed against the Rosenfields and Fiorentinos as the guarantors of Mama Tino's debts, New England Merchants employed a Florida attorney, J. J. Simons. Simons appeared for the bank in the Chapter XI arrangement proceedings, but he refused to sue the guarantors, and so informed them, because the bank had been referred to him by Coleman Rosenfield. New England Merchants thus dealt with the guarantors directly. On June 18, 1970, it contacted Nicholas Fiorentino and offered to refrain from suing him and his wife on the guaranties if he would sue Jessup & Lamont and apply the proceeds of any recovery to Mama Tino's indebtedness to the bank.[7] Fiorentino did not respond to this offer, however, so the bank withdrew it. Some time prior to September 22, 1970, New England Merchants

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[6]The record does not indicate the legal theory under which Coleman Rosenfield would have had Mama Tino proceed against Jessup & Lamont.

[7]The record does not explain the legal basis of any claim Fiorentino, or Mama Tino, may have had against Jessup & Lamont. We assume that the bank was referring to Jessup & Lamont's failure to bring a Mama Tino stock issue to market. See note 6, *supra*, and accompanying text.

obtained from the bankruptcy court various assets of Mama Tino, including several restaurants, in which the bank held a security interest.[8] The bank then employed Nicholas Fiorentino to aid it in liquidating some of these assets and to operate the restaurants the bank had acquired. As part of this employment arrangement, the bank agreed not to sue Fiorentino or his wife on their guaranties.

New England Merchants did not proceed against the Rosenfields until May 1974, when it demanded that they pay off the balance due on Mama Tino's loans. The Rosenfields refused to pay, and the bank brought this suit in the United States District Court for the District of Massachusetts. The Rosenfields promptly moved for a change of venue pursuant to 28 U.S.C. §1404(a) (1976); the motion was granted, and the case was transferred to the Southern District of Florida.

The Rosenfields raised four defenses to New England Merchants' claim that they were liable, as guarantors, for Mama Tino's $371,196 indebtedness to the bank. First, they contended that the guaranties they had executed in favor of the bank had been delivered conditionally: the guaranties were not to take effect unless and until the bank loaned Mama Tino an additional $50,000 for working capital and the Rosenfields and the Fiorentinos gave the bank their financial statements; since neither of these conditions was fulfilled, the guaranties were void. Second, the Rosenfields contended that the bank orally promised to cancel their guaranties if they would cause Mama Tino to sue Jessup & Lamont;

[8]The record contains no additional explanation as to what these assets were or where they were located.

the guaranties were thereafter cancelled on June 3, 1970, when Mama Tino sued Jessup & Lamont. Third, the Rosenfields contended that the statement of the bank's attorney, J. J. Simons, that he would not bring suit against the guarantors, released the Rosenfields from any liability to the bank on their guaranties. Fourth, the Rosenfields contended that the bank released them as guarantors when it employed Nicholas Fiorentino to look after some of Mama Tino's assets and agreed not to sue the Fiorentinos on their guaranties. The Rosenfields also counterclaimed, seeking damages from the bank for refusing to lend Mama Tino an additional $50,000 for working capital. This counterclaim was dismissed prior to trial on statute of limitations grounds and is not involved in this appeal.

The case was tried to a jury. At the close of all the evidence, the bank moved for a directed verdict on all issues, and its motion was granted. The district court entered judgment for $371,196, and the Rosenfields took this appeal.

II.

[1, 2] Our first task is to decide what substantive law to apply in this case. The rule of decision in a diversity case is a matter of state law selected under the conflicts of law principles of the state where the district court sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Where, as here, the case is transferred to another district pursuant to 28 U.S.C. §1404(a) (1976), the transferee court must apply the conflicts principles of the transferor state unless venue in the transferor state was improper. *Van Dusen v. Barrack*, 376 U.S. 612, 639, 84 S.Ct. 805,

821, 11 L.Ed.2d 945 (1964). In this case, the District of Massachusetts was a proper venue; therefore, Massachusetts conflicts rules control.

[3] To determine the validity of a contract, Massachusetts courts look first to the substantive law the parties select, if any, and they ordinarily respect such selection unless an intolerable conflict with Massachusetts policy would result. *Warren Bros. Co. v. Cardi Corp.*, 471 F.2d 1304, 1307 n.3 (1st Cir. 1973); *Massengale v. Transitron Electronic Corp.*, 385 F.2d 83, 86-87 (1st Cir. 1967). Where the parties do not specify the applicable substantive law, Massachusetts courts adhere to the conflicts rule that a contract of guaranty is governed by the laws of the state where the contract was received and acted upon by the guarantee's extension of credit. *Milliken v. Pratt*, 125 Mass. 374, 376 (1878), *cited in* Reporter's Note, Restatement (Second) of Conflict of Laws §194 (1971). There is some doubt, however, whether the Massachusetts courts would follow this rule today. In *Choate, Hall & Stewart v. SCA Services, Inc.*, 378 Mass. 535, N.E.2d 1045 (1979), the Massachusetts Supreme Judicial Court indicated that it soon might depart from traditional conflicts rules for contracts and adopt those set forth in the Restatement (Second) of Conflicts of Laws. Section 194 of the Restatement (Second) of Conflicts of Laws provides that the "validity of a contract of [guaranty] and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the law governing the principal obligation which the contract . . . was intended to secure. . . ." Fortunately, we need not speculate whether the Supreme Judicial Court would, on the facts before us, reject the traditional conflicts rule and opt for the Restatement rule because, as we shall point out, both

would require us to apply Massachusetts substantive law.

[4] With these Massachusetts conflicts principles in mind, we determine the state to which we must look, in this case, for the substantive rule of decision. We first examine the guaranties in question to determine whether the parties chose the governing law. The guaranties contain no choice of law provision. They incorporate by reference, however, the terms of the Mama Tino notes the Rosenfields guaranteed. These notes provide that Massachusetts law should govern. Whether this means that the parties agreed that Massachusetts law governs the enforceability of these guaranties is an open question, but one we need not decide. For the application of either the rule as set forth in *Milliken v. Pratt*, 125 Mass. at 376, or the Restatement rule requires us to follow Massachusetts law. The former does so because the bank accepted the guaranties in Massachusetts and acted upon them there by renewing two of Mama Tino's notes. The latter does so because Massachusetts law governs the underlying notes. In sum, whether we view the case as one in which the parties stipulated in the guaranties the choice of law or one in which they did not, Massachusetts provides the rule of decision. We now consider the four defenses the Rosenfields interposed in resisting the bank's claim for payment.

## III.

### A.

The Rosenfields contend that as a matter of law they were released from their guaranties on September

22, 1970, when New England Merchants, as part of its employment agreement with Nicholas Fiorentino, agreed not to call upon the Fiorentinos to pay off Mama Tino's debts. This forbearance by the bank, the Rosenfields conclude, amounted to an outright release of the Fiorentinos and, by operation of law, a release of them as well.[9] The Rosenfields cite *Hale v. Spaulding*, 145 Mass. 482, 14 N.E. 534 (1938), and *Matheson v. O'Kane*, 211 Mass. 91, 97 N.E. 638 (1912) in support of their position. The bank counters that these decisions do not support the Rosenfields because it did not *release* the Fiorentinos, but merely entered into a covenant not to sue which under Massachusetts law is not the equivalent of a release.

[5, 6] It is not necessary for us to decide whether the bank released the Fiorentinos on September 22, 1970, or merely agreed not to bring suit against them, because the rule that the release of one releases all is inoperative where the parties in writing evidence a contrary intent. *Hale v. Spaulding*, 145 Mass. at 483, 14 N.E. at 535. In this case, an intention that a release of one of the guarantors not release the others was evidenced in the guaranties themselves. The Rosenfields, the Fiorentinos and the bank therein agreed that the "release of any person or persons . . . may be effected without notice to *and without releasing* the undersigned."

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[9]Until 1963 Massachusetts followed the rule that the release of one potentially liable party releases all, absent the showing of a contrary intention by the parties, whether the claim sounded in tort or contract. Thereafter, Mass.Gen.Law Ch. 231B §4 foreclosed application of the rule in tort-claim contexts. *See Hayden v. Ford Motor Company*, 278 F.Supp. 267 (D.Mass.1967). The rule remains applicable to contract cases, however, and we thus apply it here.

(Emphasis added.) In short, the Rosenfields agreed that the bank's release of the Fiorentinos would not operate to release them. The Massachusetts courts uniformly accept the arms-length agreements of contracting parties unless to do so would be contrary to public policy. *See Massengale v. Transitron Electronic Corp.*, 385 F.2d at 86-87. The Rosenfields point to no Massachusetts policy that would require us to depart from this rule, and we therefore reject their argument that they were released from guaranty liability on September 22, 1970.

B.

The Rosenfields contend that the district court erred in directing a verdict in favor of New England Merchants because the evidence raised jury issues as to three of their affirmative defenses: (1) their guaranties were delivered to the bank subject to the conditions that the bank lend Mama Tino $50,000 for working capital and that the Rosenfields provide the bank with their financial statements; (2) their guaranties were cancelled when, as the bank requested, Mama Tino brought suit against Jessup & Lamont; and (3) the statements and conduct of attorney J. J. Simons released the Rosenfields from liability under their guaranties. We first determine whether any of these defenses is legally sufficient, and, if so, whether the district court was correct in taking it from the jury.

i.

[7, 8] Under Massachusetts law, if the Rosenfields' guaranties were delivered to New England Merchants subject to the condition that the bank lend Mama Tino

$50,000, the bank's failure to make that loan would bar its recovery in its suit on the contracts of guaranty.[10] *See Tilo Roofing Co. v. Pellerin*, 331 Mass. 743, 745-46, 122 N.E.2d 460, 462 (1954); *Southeastern Bank & Trust Co. v. Pappas*, ____ Mass.App. ____, 413 N.E.2d 1142 (1980). The availability of this defense depends, of course, on whether a jury could properly have found that the bank promised to lend Mama Tino $50,000 for working capital in exchange for the Rosenfields' guaranties.

[9-11] The sufficiency of evidence is a federal question. *Boeing Co. v. Shipman*, 411 F.2d 365, 368 (5th Cir. 1969) (en banc). In determining whether to grant a directed verdict, the court must consider all the evidence, not just the evidence that supports the non-movant's case, in the light most favorable to the non-movant. This test also governs this court on appeal. *Jacobs v. Deaton, Inc.*, 654 F.2d 385, 386 (1981). While neither we nor the trial judge may make credibility choices, *Glazer v. Glazer*, 374 F.2d 390, 400 (5th Cir. 1967), *cert. denied*, 389 U.S. 831, 88 S.Ct. 100, 19 L.Ed.2d 90 (1968), neither court is required to accept, as credible, unsupported self-serving testimony that flies in the teeth of unimpeachable contradictory evidence and universal experience. *Ralston Purina Co. v. Hobson*, 554 F.2d 725, 728-29 (5th Cir. 1977). *See United States v. Generes*, 405 U.S. 93, 106, 92 S.Ct. 827, 834, 31 L.Ed.2d 62 (1972) (directed verdict or judgment n. o. v. appropriate where the self-serving testimony of the non-moving party

[10]The second condition the Rosenfields allege, that the bank conditioned its acceptance of the guaranties on receipt of the Rosenfields' and the Fiorentinos' financial statements, is of no significance. That condition was for the sole benefit of New England Merchants, which was therefore free to waive it. The Rosenfields plainly cannot use it to defeat the bank's claim.

"does not bear the light of analysis"). If the facts and inferences presented at trial so strongly favor the movant that a reasonable jury could not arrive at a verdict against it, the court must direct a verdict. *Boeing Co. v. Shipman*, 411 F.2d at 374. Applying this test to the facts before us, we conclude that a reasonable jury could not have found that the guaranties were conditioned as the Rosenfields contend.

[12] The Rosenfields' sole evidence in support of their argument that the guaranties were conditioned on a $50,000 bank loan is Coleman Rosenfield's self-serving testimony that before he executed his guaranty in February 1970 and, once again, before he re-executed it in April, New England Merchants said that the guaranty would not take effect until it loaned Mama Tino $50,000.[11]

The record is replete with evidence that renders Coleman Rosenfield's testimony unworthy of any credit. First, Nicholas Fiorentino testified that the guaranties were not conditioned on a new $50,000 loan to Mama Tino, but on the renewal of the outstanding notes.

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[11]The Rosenfields tried to bolster this testimony with the deposition testimony of Carl Shaeffer, an attorney for Butlers Bank. Shaeffer testified that as of May 5, 1970, New England Merchants had refused to lend $50,000 to Mama Tino and that during May he had several conversations with an officer of New England Merchants who first told him that New England Merchants would make such a loan and later that it would not. What New England Merchants' officers might have said in May about a possible loan to Mama Tino obviously had no bearing on whether in the preceding February or April the bank promised to make a $50,000 loan in exchange for the guaranties in issue, and the district court correctly refused to admit Shaeffer's testimony into evidence. See Fed.R.Evid. 401 and 402.

Secondly, New England Merchants' officers, principally Constantinos Philips, said the bank never agreed to lend Mama Tino the additional $50,000 it needed for working capital, and their testimony was corroborated by other, unimpeached, evidence: Philips' February 2, 1970, letter to Nicholas Fiorentino, which was communicated to Rosenfield, stating that the bank "must hold up any further financing until we can grasp a better understanding of exactly what is and will be happening. . . . However, as discussed, before we can renew the notes which are due . . . in the amounts of $50,000 and $100,000 respectively, I must ask for the guaranties of yourself, Mrs. Fiorentino, Cole and Mrs. Rosenfield"; the undisputed statement of Philips at the April 9, 1970, meeting of Mama Tino's board of directors, with Coleman Rosenfield present, that the bank would not lend the company another $50,000 for working capital; and testimony concerning the April 21, 1970, board meeting where the major subject of discussion was whether Mama Tino would be able to raise an additional $50,000 in funds, and Coleman Rosenfield said nothing to suggest that New England Merchants had committed itself to making a $50,000 loan—in fact, he said that no further bank loans could be negotiated. Finally, there was evidence presented to the effect that Rosenfield, unable to secure additional financing, planned to raise the $50,000 by selling the company's surplus real estate and by suing Jessup & Lamont for failing to market a new stock issue, and he pursued this objective to the end. In the face of all this evidence, the district court was entitled to conclude that New England Merchants never promised to lend Mama Tino another $50,000 for working capital. The court therefore took appropriate action in not submitting the Rosenfields' conditional-delivery defense to the jury.

[13] The Rosenfields contend that even if the guaranties they signed were valid and otherwise enforceable, they were cancelled by operation of law when Mama Tino sued Jessup & Lamont in Florida state court on June 3, 1970. The guaranties were cancelled, they say, because the bank promised to release the guarantors the moment Mama Tino sued Jessup & Lamont for failing to bring a new stock issue to market. This defense, like the conditional-delivery defense, is supported only by Coleman Rosenfield's self-serving testimony.

Rosenfield says, simply and boldly, that prior to June 3, 1970, Constantinos Philips told Nicholas Fiorentino that New England Merchants would cancel the guaranties if Mama Tino sued Jessup & Lamont. However, Rosenfield was not a party to this claimed conversation and Fiorentino denies that he had any conversations with the bank regarding a release of its claims against him before June 3. Fiorentino recalled that he continually attempted to negotiate his release after that date, but he insisted that he was not released prior to September 22, 1970, when he and his wife signed the releases described in Part III A, *supra*, and that release had nothing whatsoever to do with a suit against Jessup & Lamont.

In an attempt to bolster his claim, Rosenfield introduced a memorandum containing a relevant internal communication between officers of New England Merchants, dated June 18, 1970. That memorandum corroborated what the bank's officers told the jury about their conversation with Fiorentino concerning a possible suit against Jessup & Lamont and effectively destroyed Rosenfield's claim that the conversation

occurred prior to June 3. The memorandum reads in pertinent part:

> [Vincent Palumbo] and I [R. T. McAlear] called Nick Fiorentino [today]. . . . Cole Rosenfield has taken a three week junket to Mexico and Nick is furious as he feels he has been left holding the bag. Aside from that we told Nick that the bank was going to begin legal action against [Mama Tino,] Nick and Coleman, as we had to protect our position. We have agreed with Nick that if he will file suit against Jessup & Lamont and the proceeds be applied against the guarantee, we would not follow up on our suits against him. This is not in writing anywhere but is an agreement between the bank and Nick Fiorentino . . . .

Nicholas Fiorentino never accepted the bank's offer; nor did he file suit against Jessup & Lamont. There was no probative evidence to support the Rosenfields' cancellation defense.

iii.

The Rosenfields contend that attorney Simons' statement to Coleman Rosenfield that he would not bring suit against the guarantors in behalf of New England Merchants, constituted an abandonment by the bank of the guaranties in issue. The bank's four-year delay in instituting this suit is said to be strong evidence of the bank's intention not to hold the Rosenfields accountable.

[14] For sake of argument, we assume that Simons made the alleged statement and that the statement is the bank's. The Rosenfields nevertheless have no defense. They gave no consideration to the bank for the claimed discharge, and consideration was necessary for Simons' statement to be enforceable at law. *Sloan v. Burrows*, 357 Mass. 412, 258 N.E.2d 303, 304 (1970); *Marcellino v. Carma, Inc.*, 3 Mass.App. 722, 324 N.E.2d 629 (1975).

IV.

[15] The Rosenfields' final claim is that the district court should have granted their motion for a mistrial. As grounds for that motion, the Rosenfields referred to the court's facial expressions and its statements to Coleman Rosenfield while on the witness stand, and to the court's obvious disbelief of Rosenfield's testimony, all of which allegedly prejudiced the plaintiffs' case before the jury. Because the court properly directed a verdict, prejudice to the jury is irrelevant. The judgment of the district court is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1627

NEW ENGLAND MERCHANTS NATIONAL BANK,
*Appellee,*

*v.*

COLEMAN R. ROSENFIELD and
GLADYS ROSENFIELD,
*Appellants.*

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA.

**Brief of Appelle, New England Merchants National Bank.**

**Roger B. Sherman,**
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## III. THE COURT CORRECTLY DENIED ROSENFIELD'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF ESTOPPEL

Rosenfield asserts that the Trial Court erred in not granting their motion for summary judgment on the issue of estoppel. See Rosenfields' brief at 22-24. The Bank has already briefed the issue of estoppel and the related one of fraud and demonstrated that the Bank was entitled to a directed verdict on these issues. It would serve no purpose to reiterate those facts and arguments. Because the Court properly directed a verdict for the Bank on Rosenfield's defenses of estoppel and fraud, it *a fortiori* acted judiciously in denying Rosenfield's motion for summary judgment.

## IV. THE COURT DID NOT ERR IN GRANTING THE BANK'S MOTION FOR SUMMARY JUDGMENT ON ROSENFIELD'S COUNTERCLAIM

Rosenfield filed a counterclaim alleging that he had been fraudulently induced to execute his guaranty (R. 126-27). The Court found the counterclaim barred by the applicable statute of limitations and hence granted summary judgment to the Bank on that issue (R. 388). Rosenfield assigns this ruling as error and essentially asserts that the Bank should be estopped from raising the statute of limitations as a defense. See Rosenfields' Brief at 24-27.

As previously mentioned, the issues of estoppel and fraud have already been fully briefed and it would serve no purpose to reiterate those arguments here except to state that Rosenfield as a practicing attorney

and sophisticated businessman would or should have been aware of the universally short limitation period for fraud, *see* Fla. Stat. §95.11 (three years); M.G.L. c. 260 §2A (two years), and of the consequences of failing to file his action within that period. Having sat on his rights, Rosenfield is now attempting to excuse his own lack of diligence because of the conduct of the Bank. This Court should follow the trial judge in rejecting such a vacuous argument.

## V. THE COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE TESTIMONY OF CARL SCHAEFFER

Rosenfield attempted to introduce as evidence the deposition of Carl Schaeffer an attorney for Butler's Bank, which was a large creditor of Mama Tino. The Trial Court excluded the testimony on the grounds that the evidence was irrelevant and prejudicial (T. 55). Rosenfield assigns the exclusion as error. See Rosenfields' Brief at 27-29. The Bank submits that the Court acted well within its discretion in excluding the testimony.

The focal point of Rosenfield's case, whether articulated as conditional delivery, failure of consideration or fraud, was his claim that prior to and contemporaneous with the execution of the guaranty, the Bank made certain representations about providing additional financing to Mama Tino, which representations caused Rosenfield to execute the guaranty. At best, the testimony of Carl Schaeffer indicated that in May of 1970, just prior to the filing of Mama Tino's bankruptcy, the Bank

in response to prompting by Schaeffer, on behalf of Butler's Bank, agreed to make an unsecured loan to Mama Tino for $50,000.00 (Dep. 17-18). The Bank submits that this evidence simply does not meet the test of relevancy.

[FILED MAR 26 1976]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER FL-75-63-CIV-JE

NEW ENGLAND MERCHANTS NATIONAL BANK,
*Plaintiff*

*vs.*

COLEMAN ROSENFIELD AND
GLADYS ROSENFIELD,
*Defendants*

**ORDER**

THIS CAUSE is before the Court on

1. Plaintiff's Motion for Summary Judgment
2. Defendants' Motion for Summary Judgment
3. Plaintiff's Motion for Summary Judgment on Counterclaim

Upon consideration of the record in the cause, it is

ORDERED and ADJUDGED that

1. Plaintiff's Motion for Summary Judgment is DENIED.
2. Defendants' Motion for Summary Judgment is DENIED.

3. Plaintiff's Motion for Summary Judgment on the Counterclaim is GRANTED. The limitations period on an action for fraud is three years in Florida (F.S. §95.11) and two years in Massachusetts (M.G.L.A. c. 260, §2). It is apparent from the face of the counterclaim that it was not brought within either limitations period & that running of time was not tolled.

As authorized by FRCP Rule 56(d), Cases Not Fully Adjudicated on Motion, this Court finds that the defense of failure of consideration is not available to Defendants for the reasons stated in Plaintiff's memoranda. Further, since Defendants have admitted the execution and genuineness of the documents sued upon, there are disputed issues of fact only as to defendants' remaining defenses: estoppel and discarge or reasonable belief that plaintiffs discharged defendants from liability on the guaranties.

DONE and ORDERED at Miami, Southern District of Florida, this 26 day of March, 1976.

/s/ Joe Eaton
United States District Judge

cc: Wasserman & Salter
Frates, Floyd, Pearson, Stewart, Proenza & Richman

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 77-1627

NEW ENGLAND MERCHANTS NATIONAL BANK,
*Appellee,*

*vs.*

COLEMAN R. ROSENFIELD and
GLADYS ROSENFIELD,
*Appellants.*

# BRIEF OF APPELLANTS COLEMAN R. ROSENFIELD AND GLADYS ROSENFIELD

APPEAL FROM THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

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## POINT III

### ALTERNATIVELY TO POINT II ABOVE, THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE DEFENDANTS' COUNTERCLAIM.

The Defendants filed a counterclaim against the Plaintiff in which they sought affirmative relief on the grounds that they had been fraudulently induced to execute the guaranties at issue here (R-126-127). The Counterclaim arose out of precisely the same set of facts upon which the present action was instituted and therefore constituted a compulsory counterclaim within the meaning of Rule 13(a) of the Federal Rules of Civil Procedure.

In its order of March 26, 1976, the trial court held that said counterclaim was barred by the applicable statute of limitation (R-388).

In *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), the United States Supreme Court reiterated the policy considerations underlying statutes of limitation:

> [S]tatutory limitation periods are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to

> defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

414 U.S. at 554. Stated alternatively, statutes of limitations are designed to protect citizens from stale and vexatious claims, *McDonald v. United States*, 315 F.2d 796 (6th Cir. 1963), and to compel parties to institute actions within a reasonable time so as to prevent fraud and other types of deceitful conduct. *Dedmon v. Falls Products, Inc.*, 299 F.2d 173 (5th Cir. 1962).

Each and every one of the above-mentioned policy considerations was contravened when the trial court barred the Defendants' counterclaim. First, the Plaintiff was in no way "surprised" by the assertion of the counterclaim because it filed the initial action. Secondly, the questions of lost evidence, fading memories and disappearance of witnesses have no relevance here because the evidence, memories and witnesses to be offered in support of the counterclaim would be virtually identical with that offered in support of the main complaint. Moreover, the passage of time was the result of the Plaintiff's conduct not that of the Defendants.

Similarly, the general policy against stale litigation is inapplicable because, as stated *supra*, the complaint and counterclaim arose out of identically the same set of facts. The counterclaim, in other words, was no more or less "stale" than the complaint.

Lastly, the order barring the counterclaim had the effect of rewarding a party (the Plaintiff) whose conduct was precisely that which statutes of limitations are

supposed to penalize. The above-cited authorities condemn those parties who have slept on their rights and lulled others into a false sense of security. The Plaintiff in this case fits directly within that class of litigant.

On or about March 21, 1970 the Board of Directors of *Mama Tino, Inc.*, the principal debtor, informed the Plaintiff that the corporation had elected to file a petition under Chapter XI of the Bankruptcy Act (R-8). At this point, it became evident to all concerned that *Mama Tino* would be unable to meet the terms of the Plaintiff's notes. The Plaintiff's cause of action against the Defendant guarantors, therefore, accrued at that point.

Nevertheless, the Plaintiff did not make a demand for payment from the Defendants until May 10, 1974 (R-5), shortly before the filing of this action. Thus, there was a time differential of approximately four (4) years and two (2) months between the filing of the Chapter XI petition and the first demand for payment.

It can hardly be considered coincidental that Florida had a four (4) year statute of limitations on fraud actions. *Fla. Stat.* §94.11(3)(5). Instead, it would appear as though the Plaintiff took special pains to avoid making its demands on the Defendants and filing suit until the four year statutory period had elapsed. In fact, from the statements of Mr. Simons, the Plaintiff's lawyer, to the Defendant Rosenfield, that the Plaintiff had no intention of attempting to enforce the guaranties (T-122), one might reasonably infer that the Plaintiff *intentionally* misled the Defendants into believing that no action would be taken, therby relieving the Defendants of the necessity of filing an action based on fraud for the reasons discussed under Point I, *supra*.

Recognizing that situations arise in which it would be unfair to invoke the statute of limitation to bar a party's claim, the United States Supreme Court, in *Burnett v. New York Central R. R. Co.*, 380 U.S. 424 (1965), stated that:

> This policy of repose, designed to protect Defendants, is frequently outweighed, however, *where interests of justice require vindication of the Plaintiff's rights.*

380 U.S. at 428 (emphasis added). In the present case, the Defendants respectfully submit that the interests of justice requiring vindication of the Defendants rights far outweigh the policy of "repose". For reasons discussed *supra*, virtually every rationale underlying statutes of limitation mandate that the Defendants be permitted to maintain their counterclaim. By the same token, to allow the Bank to be rewarded for its own reprehensible conduct would violate all of the aforementioned policy considerations and constitute a substantial injustice to the Defendants.

## POINT IV

### THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF A WITNESS WHICH WAS RELEVANT AND CORROBORATED THE TESTIMONY OF THE *DEFENDANT.*

Rule 402 of the *Federal Rules of Evidence* provides that all relevant evidence is generally admissible. Rule 401 of the *Federal Rules of Evidence* sets forth the definition of relevant evidence:

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 77-1627

NEW ENGLAND MERCHANTS NATIONAL BANK,
*Appellee,*

*vs.*

COLEMAN R. ROSENFIELD, and
GLADYS ROSENFIELD,
*Appellants.*

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

# REPLY BRIEF OF APPELLANTS.

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## III. THE COURT ERRED IN DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF ESTOPPEL.

As discussed above under C and in Defendants' principal brief at pages 22-24 the trial court did err in failing to grant Defendant's Motion for Summary Judgment relative to estoppel. Since that point has been thoroughly briefed already, it will not be expanded on here.

## IV. THE TRIAL COURT ERRED IN GRANTING THE BANK'S MOTION FOR SUMMARY JUDGMENT ON THE ROSENFIELDS' COUNTERCLAIM.

This issue has been thoroughly briefed in Defendants' principle brief and will not be reargued here. Defendants will only point out to the Court that to allow a Plaintiff such as the Bank to wait over four years to file an action until the statute of limitations on fraud claims against itself had run is unconscionable. The Defendants in this case would never have filed any affirmative action against the Bank had the Bank not pursued its claimed guarantees. Therefore, it is specious to say that the Defendants could have filed first. Such a filing would have itself insured that the Bank would in turn raise the guarantees as a counterclaim to any such affirmative actions on Defendants' part.

## V. THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF CARL SHAEFFER.

It has been the position of the Defendants throughout the course of this litigation that the Bank promised to

make the bankrupt Mama Tino's a $50,000 loan in exchange for the Defendants' guarantees. Bank officials vehemently denied that it had *ever* made an agreement to lend the bankrupt an additional $50,000. Thus,

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

CASE NO. 77-1627

NEW ENGLAND MERCHANTS NATIONAL BANK,
*Appellee,*

*vs.*

COLEMAN R. ROSENFIELD and
GLADYS ROSENFIELD,
*Appellants.*

# PETITION FOR PANEL REHEARING OF APPELLANTS COLEMAN R. ROSENFIELD AND GLADYS ROSENFIELD

APPEAL FROM THE UNITED STATES DISTRICT
COURT SOUTHERN DISTRICT OF FLORIDA

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## PETITION FOR PANEL REHEARING

On July 1, 1982 this Court affirmed the judgment of the United States District Court for the Southern District of Florida, Gus J. Solomon, Jr., sitting by designation in favor of the NEW ENGLAND MERCHANTS NATIONAL BANK (hereinafter "New England").

The Defendants-Appellants GLADYS and COLEMAN ROSENFIELD (hereinafter "Rosenfield") petition the panel for rehearing on the grounds that the Court's opinion:

(1) Fails to rule on Defendants-Appellants' Points II and III on Appeal concerning their counterclaim and in fact *erroneously states at page 15345 that these points are "not involved in this appeal."*

(2) Fails to rule on Defendants-Appellants' Point V on Appeal relative to recusal of the trial judge.

(3) Fails to consider the prejudicial effect of the trial court's improper and prejudicial conduct on the entire trial, the trial record and the evidence.

(4) Contains critical errors of law concerning the admissibility of evidence.

(5) Improperly determines the credibility of witnesses.

**(6) Misconstrues the legal effect of Defendants-Appellants' reliance on the statements of the attorney for New England that no suit would be brought against them.**

**1. Failure to Rule on Points II and III of Appeal.**

This Court's opinion *erroneously states at page 15345 that the Defendants-Appellants' Counterclaim "is not involved in this appeal."* Points II and III from Defendants-Appellants' Brief on Appeal and relevant to the dismissal of their counterclaim are attached in reverse order to this Petition as Appendix A. This clearly demonstrates that Defendants-Appellants did raise as an issue on appeal the trial court's dismissal of their counterclaim as being barred by the applicable statute of limitations. Defendants-Appellants are entitled to have these points ruled on by this Court and not have them summarily and erroneously passed over as not being involved in the appeal.

In relation to this issue the facts are uncontested that the lawyer for New England told Defendants-Appellants that he would not bring a suit against them and this Court assumed, as a matter of law, that such a statement was New England's statement.[1] Defendants-Appellants relied on this statement and took no affirmative actions to protect their claims against New England. Thereafter, New England waited over four years until after the applicable statute of limitations had run to bring the present action.

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[1]See page 15349 part iii and point [14] of this Court's opinion.

Defendants-Appellants contended on appeal that based on New England's having lulled them into non-action by their lawyer's statement New England should be estopped from bringing the present action (Point II on Appeal) or in the alternative, their counterclaim should not have been barred by the applicable statute of limitations (Point III on Appeal). Appendix A taken from Defendants-Appellants' brief fully addresses these issues.

Most recently in an opinion dated May 12, 1982 the Florida Courts have ruled that a defendant's counterclaim is not barred by the statute of limitations when it is based on the underlying facts and transactions upon which the plaintiff's claims are also based. *Cherney v. Moody,* 413 So.2d 866 (Fla. 1st DCA 1982). This decision has been certified to the Florida Supreme Court.

Based on the foregoing it is clear that the Defendants-Appellants' counterclaim should not be barred by the applicable statute of limitations or in the alternative New England should be estopped from pursuing its claims.

**2.&3. Failure to Rule on Point V of the Appeal Concerning Recusal and the Effect of the Judge's Biased Conduct Below.**

Any litigant is entitled to a fair and impartial trial which is free from bias and prejudice or the appearance of such. This is the basic tenant of our entire judicial system. Defendants-Appellants did not receive such a trial in the present case. The Court passes over this issue in its opinion. The Court did not address or rule

on the issue of whether or not the trial judge should have recused himself which issue is raised in Point V of the Defendants-Appellants' brief.

It is clear on the face of the record that the trial judge was not impartial. In fact it is equally apparent that the trial judge sought to control the outcome of the case so that Defendants-Appellants would lose. This is demonstrated by the trial court's own admission in open court to New England's trial counsel that:

> The Court: I am going to let you go ahead. *I have been trying to protect you, Mr. Cohn.* But you go ahead.

(Emphasis added, T. 306).

[FILED AUG 30 1982]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*
UNIT B

NO. 77-1627

NEW ENGLAND MERCHANTS NATIONAL BANK,
*Plaintiff-Appellee,*

*versus*

COLEMAN R. ROSENFIELD and
GLADYS ROSENFIELD,
*Defendants-Appellants.*

Appeal from the United States District Court
for the Southern District of Florida

ON PETITIONS FOR REHEARING
( )

Before GODBOLD, Chief Judge, TJOFLAT and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:

[illegible]
United States Circuit Judge

No. 82-924.

# In the
# Supreme Court of the United States.

OCTOBER TERM, 1982.

COLEMAN R. ROSENFIELD AND
GLADYS ROSENFIELD,
PETITIONERS,

*v.*

NEW ENGLAND MERCHANTS NATIONAL BANK,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

## Respondent's Brief in Opposition.

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## Questions Presented for Review.

1. Where the Court of Appeals has correctly decided and ruled against the petitioners on an affirmative defense, does the failure of the court to formally rule on the same issue also raised as a counterclaim deny the petitioners due process of law where the issue is without merit?

2. Where the petitioners did not introduce any credible evidence in support of their affirmative defenses did the district court err in directing a verdict in favor of the respondent?

## Table of Contents.



## Table of Authorities Cited.

### Cases.

STATUTES.

MISCELLANEOUS.

No. 82-924.

# In the

# Supreme Court of the United States.

OCTOBER TERM, 1982.

COLEMAN R. ROSENFIELD AND
GLADYS ROSENFIELD,
PETITIONERS,

*v.*

NEW ENGLAND MERCHANTS NATIONAL BANK,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

## Respondent's Brief in Opposition.

### Statement of the Case.

A. *Proceedings Below.*

This action was a suit on a guaranty in which the plaintiff-respondent, New England Merchants National Bank ("bank"),[1]

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[1] New England Merchants National Bank has now changed its name to Bank of New England, N.A. ("bank"). The parent company of the bank is Bank of New England Corporation. Sup.Ct.R. 28.1.

sued the defendants-petitioners, Coleman R. Rosenfield ("Rosenfield") and Gladys Rosenfield ("Mrs. Rosenfield") (collectively "the Rosenfields") for an indebtedness of Mama Tino's, Inc. ("Mama Tino"), a bankrupt corporation, in the amount of $383,340.99 (R. 5-9).[2] Jurisdiction was predicated on 28 U.S.C. § 1332.

Mama Tino's principal shareholders were the Rosenfields and Mr. and Mrs. Nicholas Fiorentino who were also guarantors of Mama Tino's indebtedness to the bank (Tr. 104-105). The Rosenfields acknowledged executing the guaranty (R. 125) but during the course of the proceedings raised numerous affirmative defenses including the defenses that the guaranty was conditionally delivered and induced by fraud (R. 125-126, 556; Tr. 76-77; A. 12-13). Relying on the same facts used to support the defense of fraud, the Rosenfields counterclaimed for fraud in the inducement and sought monetary damages (R. 125-127). Although the counterclaim of fraud was dismissed because it was barred by the statute of limitations (A. 28-29), the defense of fraud was tried to the jury; as with the other defenses, because there was no credible evidence introduced in support thereof, the district court, at the close of all evidence, directed a verdict in favor of the bank (Tr. 76-77; R. 556-558).

### B. *Statement of the Facts.*

The principal issue at trial was whether the Rosenfields executed and delivered their guaranty to the bank on the condition that the bank provide Mama Tino with $50,000 of addi-

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[2] References to the Record shall be designated (R. ). References to the Transcript shall be designated (Tr. ). References to the Appendix of the Petition shall be designated (A. ).

tional funding. The Court of Appeals dispassionately and at length recited the material facts (A. 7-13, 19-22), the accuracy of which is not challenged by the petitioners.

The only evidence arguably supporting the Rosenfields' claim that the bank promised $50,000 of additional funding in exchange for their guaranty, was certain self-serving testimony by Rosenfield (A. 19). That testimony at trial was not only uncorroborated, but conflicted with Rosenfield's own conduct, the testimony of every other witness and with the unimpeached documentary evidence.

Fiorentino testified that the guaranties were not conditioned on a new loan being advanced to Mama Tino, but that they were given in exchange for the renewal of the outstanding notes (A. 19; Tr. 267-272). This was confirmed by the testimony of numerous bank officers who testified to the same effect (A. 20; Tr. 197; 216-217, 244-245), and was specifically corroborated by unimpeached documentary evidence in the form of the cover letter from the bank dated February 2, 1970 enclosing the guaranties which were subsequently executed by the Rosenfields and the Fiorentinos on February 6, 1970 (A. 20; Tr. 135-137). The letter stated that the bank had not yet decided on whether to commit further financing but that it needed the guaranties executed before the bank would renew the notes.

Rosenfield's own conduct completely belied his claim that the bank breached a promise of $50,000 of additional funding in February, 1970. In May of 1970, Rosenfield drafted an agreement in which the bank was asked to accept a pro-rata distribution of any funds Mama Tino recovered from Jessup & Lamont, a brokerage firm, for an alleged failure to perfect a public stock offering in exchange for the bank discharging the guarantors (R. 163-167). Indeed, some months earlier, Rosenfield told the bank that he would never release his claim against the brokerage firm since it would be his only source

of income to pay off the guaranty if Mama Tino filed for bankruptcy (Tr. 188-189).

When Mama Tino did file for bankruptcy, Rosenfield filed a proof of claim as a creditor on the basis of the guaranty he had given to the bank (Tr. 153-155). The claim, filed under the penalties of perjury, failed to allege that the guaranty was in any way conditional, notwithstanding that the proof of claim form contained a provision requiring the creditor to list any counterclaims or defenses to the claim (Tr. 154-155).

Finally, there was uncontradicted testimony that at a crucial financial analysis meeting of the Board of Directors of Mama Tino's in April of 1970, there was no mention by Rosenfield that the bank had ever committed itself to making a $50,000 loan. In fact, Rosenfield stated at the meeting that no further bank loans could be negotiated (A. 10, 20; Tr. 142-143; 232-236).

## Reasons Why the Writ of Certiorari Should Not be Granted.

The Rosenfields have not sustained their burden of establishing under Supreme Court Rule 17 that there are special and important reasons why the writ should be granted. The decision below is not in conflict with any applicable decision of this Court or of another Court of Appeals on the same matter. Moreover, there is no question of federal law which has not been, but should be, settled by this Court; nor, as will be demonstrated, did the trial court depart from any accepted and usual course of conducting judicial proceedings as would call for an exercise of this Court's extraordinary power of supervision. *See*, Sup.Ct.R. 17.1(a), (c).

The within case is a simple run-of-the-mill suit on a guaranty, which raises no novel questions of law and affects no one except the immediate parties. The decision of the Court of Appeals was largely confined to applying an undisputed set of facts to a well established legal standard to determine whether the district court properly directed a verdict in favor of the bank. Such an opinion hardly warrants further review. *See, National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938) ("Whether respondents . . . are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it".)

## I. The Rosenfields were Not Denied Due Process of Law as a Result of the Alleged Failure of the Court of Appeals to Review an Issue Raised on Appeal.

The Rosenfields disingenuously assert, as their principal reason why this Court should review the case, that they were denied due process of law when the Court of Appeals failed to specifically articulate a ruling on the propriety of the action by the district court in granting summary judgment in favor of the bank on the Rosenfields' counterclaim alleging fraud in the inducement. *See* Petition at 11-12. The district court ruled that the fraud counterclaim was barred by the statute of limitations (A. 28-29).

The basis of the fraud counterclaim was that the bank induced the Rosenfields to execute their guaranty by promising to loan Mama Tino an additional $50,000 when the bank never intended to honor its promise (R. 126-127). This is precisely the same argument that the Rosenfields raised as an affirmative defense (A. 12-13; R. 125, 556; Tr. 76-77). Indeed,

the district court expressly permitted the Rosenfields to try this issue (R. 76), and it was only after the Rosenfields put in their case and it became evident that there was no evidence supporting the affirmative defense, that the court granted a directed verdict (R. 556-558).[3] Since the district court correctly directed a verdict on the affirmative defense of fraud, it would have necessarily directed a verdict on the *identical* issue postured as a counterclaim even if the counterclaim were not barred by the statute of limitations. The evidence supporting the defense of fraud was extensively reviewed by the Court of Appeals, and found to be totally insufficient to warrant submission to a jury (A. 19-22). Accordingly, the Court of Appeals discharged its obligation, since the merit of the issue involved in Rosenfields' claim of error was, in fact, carefully considered, and rightfully rejected.

Moreover, the Rosenfields raised literally a plethora of issues on appeal and the Court of Appeals is under no obligation to write a detailed answer to every argument raised by an appellant, especially where the argument is totally lacking in merit. Indeed, an appellant does not even have a right to oral argument, and the Court of Appeals may summarily dispose of a case without rendering any written opinion. *See*, Fed.R.App. P. 34(a); Local Rules 18 and 21 of the United States Court of Appeals for the Fifth Circuit, 28 USCA; *National Labor Relations Board* v. *Amalgamated Clothing Workers of America*, 430 F.2d 966, 967 *et seq.* (5th Cir. 1970); *Isbell Enterprises*,

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[3] As the district court stated:

> At the conclusion of all the evidence, Plaintiff moved for a directed verdict. I concluded that most, if not all, of the defenses were legally insufficient, and even if one or two had some legal validity, they were not supported by any credible evidence. *The deposition testimony on the issues of fraud and conditional delivery consisted only of speculation and supposition.* (R. 557-558) (emphasis supplied.)

*Inc.* v. *Citizens Casualty Co. of New York*, 431 F.2d 409 (5th Cir. 1970). In effect, all the Court of Appeals did was to deny Rosenfields' claim of error as to the ruling on the counterclaim, and unless the Rosenfields can demonstrate that they were entitled to prevail on their counterclaim, which they were not, the court's failure to discuss the issue in detail is irrelevant.

## II. The Trial Court's Conduct did Not Deny Petitioners Due Process of Law.

The Rosenfields contend that the alleged bias of the district court denied them due process of law. The Court of Appeals rejected Rosenfield's claim of bias on the part of the district court by holding, *inter alia*, that since the district court correctly directed a verdict in favor of the bank, any claim of bias is immaterial (A. 23). The court's holding is consistent with the other decisions on point, *see e.g.*, *In re International Business Machines Corp.*, 618 F.2d 923, 930 (2d Cir. 1980) ("If we determined that some adverse rulings were correctly made, obviously they could not be tainted by bias"); *Securities and Exchange Commission* v. *Bartlett*, 422 F.2d 475, 481 (8th Cir. 1970) and the Rosenfields do not contend to the contrary. Accordingly, since their underlying appeal is without merit, the claim of bias on the part of the district court need not be considered since, at best, it would be harmless error. *In re International Business Machines Corp.*, *supra* at 930.

Even considering the claim, there was no reason for the district court judge to recuse himself. Under 28 U.S.C. § 144, disqualifying prejudice or bias must be "personal" *i.e.*, it must stem from something other than an opinion formed by the judge in the course of the proceedings. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Berger* v. *United States*,

255 U.S. 22, 31 (1921). It must have its origins beyond the four corners of the courtroom. The bias alleged by the Rosenfields, even assuming the truth of their claim, was that the court prejudged the case prior to hearing all the evidence. This is a classic example of judicial bias, *i.e.*, bias which is the product of opinions or attitudes developed by the judge during the course of the trial. Judicial bias is not a ground for disqualification. *United States* v. *Grinnell Corp.*, *supra* at 583; *United States* v. *Gordon*, 634 F.2d 639, 641 (1st Cir. 1980); *United States* v. *Hoffa*, 382 F.2d 856, 859 (6th Cir. 1967), *cert. denied*, 390 U.S. 924 (1968). Finally, there was no pervasive bias or prejudice which so permeated the trial as to constitute a limited exception to the "extra judicial" requirement, assuming that such an exception exists. *Davis* v. *Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

In the instant case, the Court maintained even-handed control of the proceedings.[4] Although the judge may have stated

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[3] The following colloquy is but one of the many examples during the trial of the court's impartiality.

> THE COURT (After denying the Rosenfields' motion for disqualification]: It is true I don't believe the testimony of Mr. Rosenfield. But, as I pointed out, I was surprised at the cross-examination of Mr. Cohn, who I thought was doing more for your client than you possibly could have done for him because he asked the "why" question all of the time and permitted Mr. Rosenfield to answer these questions.
>
> Mr. Rosenfield's case now is better than it ever has been as a result of his examination.
>
> MR. GREER (Defendant's Counsel): Your Honor, I would agree with that.
>
> THE COURT: He was helping you. I was somewhat surprised at his type of cross-examination which permitted Rosenfield to go into questions that he never could have gone into had Mr. Cohn not asked him those questions.
>
> So, I am going to deny your motion.
>
> MR. GREER: Your Honor, there was no disrespect intended.

that he did not believe Rosenfield's testimony (Tr. 132), such a statement made outside the presence of the jury does not establish grounds for recusal. *See, United States* v. *Azhocar*, 581 F.2d 735, 740-741 (9th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979).

Finally, the procedural requirements for disqualifying a judge on grounds of prejudice and bias are well settled and set forth in 28 U.S.C. § 144. That statute requires a party claiming bias to file an affidavit together with a certificate of good faith by his counsel. The statutory requirements for disqualifying a trial judge must be strictly followed to safeguard the judiciary from frivolous attacks upon its dignity and integrity and to ensure the orderly functioning of the judicial system. *United States* v. *Womack*, 454 F.2d 1337, 1341 (5th Cir. 1972). In the case at bar, the Rosenfields filed neither an affidavit nor a certificate of good faith. Accordingly, they are deemed to have waived this claim of error. *Galella* v. *Onassis*, 487 F.2d 986, 997 (2d Cir. 1973).

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THE COURT: That's perfectly all right. *As far as Mr. Rosenfield is concerned, I don't believe him. I am constantly hearing cases in which I don't believe a party.*

*If a lawyer wants to ask foolish questions, I'm going to let him do it. I resolved that in this case. If a person wants to ask him why he did certain things, I'm going to let him do it.* I will let you do it too. I think once I make a ruling, I want you to abide by it. *If I was trying to do Mr. Rosenfield any harm, I would have stopped Mr. Cohn, but I didn't.* I saw you were looking like the cat that ate the canary when he was asking these questions.

MR. GREEN: Your Honor, I prefer not to comment on that (Tr. 172-174; *see also*, Tr. 165) (emphasis supplied).

III. In Light of the Overwhelming Undisputed Testimony and Evidence, Rosenfield's Self-serving Testimony did Not Warrant Jury Consideration.

It has long since been settled that the directed verdict standard does not violate the Seventh Amendment guaranty of a right to trial by jury. *Galloway* v. *United States*, 319 U.S. 372, 389 (1943); *Boeing Company* v. *Shipman*, 411 F.2d 365, 373 (5th Cir. 1969). Equally well settled is the notion that self-serving testimony which either flies in the face of unimpeachable contradictory evidence or which does not bear the light of analysis does not create a jury question. *United States* v. *Generes*, 405 U.S. 93, 106 (1972); *Ralston Purina Co.* v. *Hobson*, 554 F.2d 725, 728-729 (5th Cir. 1977). The Rosenfields do not challenge these principles of law but merely their application to the facts of this case. As previously mentioned, it is inappropriate and unnecessary for this Court to undertake the same factual analysis as the Fifth Circuit. *General Talking Pictures Corp.* v. *Western Electric Co.*, *supra* at 178.

Contrary to the petitioners' characterization of the evidence, this was not simply a credibility dispute between contradictory testimony of witnesses as to whether the bank promised additional funding in exchange for the guaranties. Rather, Rosenfield's own conduct and testimony about what transpired during the relevant time period is so utterly inconsistent with his later uncorroborated testimony concerning the existence of a promise of funding as to require that his subsequent testimony be disbelieved. Moreover, when Rosenfield's testimony is coupled with the unimpeached documentary evidence and the unbiased testimony of neutral third parties, it becomes evident that Rosenfield's testimony concerning the alleged conditional nature of the guaranty was nothing but an afterthought which "does not bear the light of analysis". *United States* v. *Generes*, *supra* at 106; A. 19. In light of the

overwhelming effect of the evidence, the Court of Appeals correctly concluded that the district court was not only authorized but obligated to direct a verdict in favor of the bank (A. 19).

## IV. The District Court did Not Abuse its Discretion in Excluding Deposition Testimony.

The Rosenfields attempted to introduce the deposition testimony of Carl Schaeffer, an attorney for Butler's Bank. At best, the testimony indicated that in May of 1970 Schaeffer had several conversations with a bank officer who told Schaeffer that the bank had finally decided, *i.e.*, decided in May of 1970, to commit additional funding to Mama Tino. The trial court excluded the testimony on grounds that the evidence was irrelevant and prejudicial (Tr. 55-56) and the Court of Appeals affirmed (A. 19 n.11). On appeal, the Rosenfields reiterate the same argument unsuccessfully pressed below that the testimony was relevant and the exclusion is grounds for reversal by this Court.

A trial court is given wide latitude in ruling on questions of relevance, and absent a clear showing of an abuse of discretion such a ruling will not be disturbed on appeal. *United States* v. *Wyers*, 546 F.2d 599, 603 (5th Cir. 1977). As the Court of Appeals correctly observed: "What [bank] officers might have said in May [of 1970] about a possible loan to Mama Tino obviously had no bearing on whether in the preceeding February or April the bank promised to make a $50,000.00 loan in exchange for the guaranties in issue. . . ." (A. 19 n.11.)

This ruling is in accord with generally accepted black letter law, *see, Anderson* v. *Merchants and Miners State Bank*, 161 Ga. 12, 129 S.E. 650, 652 (1925) (evidence as to probable state of mind of maker of note after its execution is irrelevant to

establish his intention at the time he executed note); 29 Am.Jur.2d, Evidence § 245 (1967). There was no abuse of discretion.

## Conclusion.

Neither the district court nor the Court of Appeals committed any arguable error which would warrant this Court's review. Indeed, a review of the record indicates that this is a garden-variety collection case in which the petitioners are using a petition to this Court as yet another delaying tactic to avoid paying the judgment. For all of the aforesaid reasons the Court should deny the petition for writ of certiorari and because the petition is frivolous, the Court should award the bank appropriate damages. *See*, Sup.Ct.R. 49.2.

Respectfully submitted,

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